Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD SHARIF, ET AL.,

Petitioners,

vs.

WELLNESS INTERNATIONAL NETWORK, LTD., WIN NETWORK, INC., ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings in this case, as to call for an exercise of this Court's supervisory power.

2. Whether this case presents an issue of first impression because the question of whether a district court may enforce a local rule in a manner which causes a party to lose rights contrary to the savings clause provided under Federal Rule of Civil procedure 83(a)(2) has never been squarely addressed by this Court.

PARTIES INVOLVED

All parties who have an interest in the outcome of this case do not appear or the caption of the case on the cover. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follow:

1. The Petitioners are: Richard Sharif, Waqar Khan, Shafqut Khan, Abdul Rashid and Shaheen Rashid.

2. The Respondents are: Wellness International Network, Ltd., Win Network, Inc., Ralph Oats and Cathy Oats.

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PETITION FOR WRIT OF CERTIORARI

Richard Sharif, Waqar Khan, Shafqut Khan, Abdul Rashid and Shaheen Rashid, hereinafter referred to as ("Petitioners") pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Texas affirming the district court's judgment granting Respondents summary judgment which is predicated upon Petitioners' trial counsel's technical non-compliance with Local Rule 7.1(b)(1) of the United States District Court for the Northern District of Texas.

JUDGMENT AND OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is set out in the Appendix at A, and is unreported.

JURISDICTIONAL STATEMENT

Petitioners invoked the jurisdiction of the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1332 on the grounds complete diversity of citizenship existed between the parties and on the grounds the amount in controversy exceeded $75.000. Petitioners also invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331 and 18 U.S.C. §§ 1964, 1965 on the grounds Petitioners asserted a Civil Rico cause of action in their complaint. Additionally, under 28 U.S.C. § 1367 the district court had supplemental jurisdiction over Petitioners' state law claims. A final judgment was entered by the district court on July 17, 2007.

On July 23, 2007, Petitioners filed their notice of appeal in accordance with Rule 4(b) of the Federal Rules of Civil Procedure, thereby invoking the jurisdiction of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291. The Fifth Circuit Court of Appeals entered judgment on April 8, 2008.

Petitioners now invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Federal Rule of Civil Procedure 83(a)(2) which states that a local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a non-willful failure to comply with the requirement.

II. Local Rule 7.1(b)(1) of the United States District Court for the Northern District of Texas which requires a Certificate of Conference to be attached to a motion if a motion is opposed by a party.

III. Federal Rule of Civil Procedure 36(a)(3), which provides that a matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.

IV. The Seventh Amendment of the United States Constitution which guarantees a litigant the right to a trial by jury.

STATEMENT OF THE CASE

In April of 2002, Petitioners who are all former independent distributors of Wellness International products, brought suit in the United States District Court for the Northern District of Illinois – Eastern Division, against Wellness International Network LTD, a Texas Corporation, a/k/a WIN and several of its corporate officers and individual affiliates alleging that the WIN distributorships for which they paid substantial sums (in varying amounts up to in excess of $400,000) were in fact part of an illegal pyramid scheme and fraudulent. The suit sought declaratory judgment and injunctive relief declaring the distributorship contracts void and prohibiting their enforcement against Petitioners, and seeking damages (trebled under RICO), punitive damages and attorneys' fees and costs. More specifically, the suit alleged violations of the RICO statute, the federal securities law, the Illinois Consumer Fraud Act and the common law, as well as violations of the criminal law giving rise to an alleged right to void the distributorship contracts as being against public policy.

Said lawsuit ultimately resulted in the Seventh Circuit Court of Appeals issuing a published opinion entitled **Sharif, et al., v. Wellness, et al.**, 438 F.3d 759 (7th Cir. 2006).[1] The opinion reveals, the 7th Circuit vacated the district court's decision to dismiss Petitioners' lawsuit for lack of prosecution and also reversed the district court's denial of WIN's motion to compel arbitration.

On July 8, 2005, while the above mentioned appeal was pending before the 7th Circuit Court of Appeals, Petitioners filed a lawsuit in the Northern District of Texas naming Wellness International Network, LTD., its general partner WIN and three of its principles, Ralph

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[1] A copy of the Seventh Circuit's published opinion is included in the Appendix at B.

Oats, Cathy Oats and Sheri Matthews as Defendants. In their lawsuit, Petitioners alleged that the Defendants operated an illegal pyramid scheme disguised as a multi-level marketing operation which sold and distributed health and wellness products.

More specifically, the Complaint alleged violations of the Racketeer Influenced and Corruption Act ("RICO"), common law and fraud claims, and violations of the Texas Deceptive Practices Act ("DTPA"), which resulted in the Petitioners suffering combined financial injuries in the amount of approximately $995,000.00 at the hands of the Defendants.

Shortly after filing their lawsuit in the Northern District of Texas, Petitioners filed an unopposed motion to stay all proceedings pending a decision by the Seventh Circuit Court of Appeals related to their lawsuit filed in the Northern District of Illinois. On December 29, 2005, the district court for the Northern District of Texas entered an order staying all proceedings and the case was administratively closed.

Subsequently, on February 17, 2006, the Seventh Circuit rendered its decision related to Petitioners' lawsuit filed in the Northern District of Illinois and an order was entered by the district court in the Northern District of Texas lifting the stay of July 27, 2006. A trial scheduling order was entered by the district court for the Northern District of Texas on August 22, 2006. Said order also required the Parties to inform the district court of their choice of an agree-upon mediator and directed the Parties to mediate the case if possible by December 22, 2006.

On September 15, 2006, the undersigned filed an application to appear pro hac vice in the United States District Court for the Northern District of Texas on behalf of all of the Petitioners due to their prior Chicago attorney, Robert Plotkin becoming extremely ill. Sixty-eight days later on November 22, 2006, Respondents' attorneys served one set of 291 requests for admissions upon Petitioner Richard Sharif, one set of 238 requests for

admissions upon Richard Sharif's mother Soad Wattar and his sisters Hafi Kaj and Ragda Shariefh, one set of 220 requests for admissions upon Petitioners Abdul Rashid and Shaheen Rashid and one set of 228 requests for admissions upon Petitioners Waqar Khan and Shafqut Khan along with their requests for other discovery materials.

On December 20, 2006, when it became apparent to the undersigned that it would be impossible to answer all of the Respondents' requests for admissions by December 22, 2006, the undersigned electronically filed a motion seeking an extension of time to comply with Respondents' requests for Rule 36 Admissions and other requests for discovery materials. Additionally, on said date, the undersigned simultaneously filed a motion seeking an extension of the mediation deadline date after being unable to agree with the Respondents' attorney about the person who would mediate this matter.

Subsequently, on January 5, 2007, the district court entered an order directing the clerk to unfile the Petitioners' motion for an extension of time to comply with Respondents' requests for admissions and other discovery materials, because, Petitioners' motion did not contain a separate certificate of conference as required under N.D. TEXAS LOCAL RULE 7.1(b)(1). [2] However, the district court **did not** enter an order directing the clerk to unfile Petitioners' motion for an extension of time of the mediation deadline date, even though, said motion did not contain a separate certificate of conference as required by N.D.TEXAS LOCAL RULE 7.1(B)(1). On January 9, 2007, the undersigned filed a Renewed Motion for an

[2] Although, Petitioners' motion for an extension of time did not contain a separate certificate of conference attached to said motion as required under N.D. Texas Local Rule 7.1(b)(1). Nevertheless, said motion advised the district court in the body of the 3-page motion that the parties had conferred and that the Respondents were opposing said motion.

Extension of Time to Comply With Respondents' Requests for Admissions and Other Discovery Materials, and again failed to include a separate certificate of conference as required under N.D. TEXAS L.R. 7.1(b)(1) but again advised the district court in the body of the three-page motion that he had conferred with Respondents' counsel who was opposed to the district court granting Petitioners' motion for an extension of time to comply with Respondents' requests for admissions and other discovery materials. Consequently, because the Renewed Motion did not contain a separate certificate of conference, the district court ordered the clerk to unfile the Renewed Motion on January 11, 2007.

Subsequently, Respondents took the position that all of their Requests for Admissions served upon Petitioners were deemed admitted as a matter of law under Fed.R.Civ.P. 36(a)(3). On March 22, 2007, the undersigned filed a Motion to Vacate Alleged Defaulted Admissions. Said motion was referred to a magistrate judge and after the matter was fully briefed, the magistrate judge entered an order denying Petitioners' Motion To Vacate Alleged Defaulted Admissions on April 12, 2007.

On April 22, 2007, Petitioners filed an Objection to the Magistrate Judge's ruling on their Motion to Vacate Alleged Defaulted Admissions, to which Respondents filed a response on May 2, 2007. The district court overruled Petitioners' Objections on May 7, 2007, ruling that Petitioners failed to show that the Magistrate Judge's ruling was clearly erroneous or contrary to law.

On May 21, 2007, Petitioners filed a Motion For Reconsideration of the Court's Order of May 7, 2007, wherein the Court overruled their Objections to the Magistrate Judge's ruling on their Motion to Vacate Alleged Defaulted Admissions. Respondents filed a response on May 25, 2007. The district court denied Petitioners' Motion for Reconsideration on May 31, 2007.

On May 24, 2007, Petitioners filed a First Amended

Complaint, asserting two causes of action: (1) violation of the Texas Deceptive Trade Practice Act (DTPA), and (2) "RICO claims," asserting violations of 18 U.S.C. §§ 1962 (a)-(c). Respondents filed a Partial Motion to Dismiss the First Amended Complaint, for failure to comply with Rule 9(b) and failure to state a claim under Rule 12(b)(6).

On June 11, 2007, Respondents also filed a Motion for Summary Judgment on all remaining claims on four grounds: (1) Petitioners' deemed admissions either negated the existence of a material element on each of Petitioners' claims, or established that there was no evidence to support one or more essential elements on each of Petitioners claims; (2) limitations barred all of Petitioners' claims; (3) Respondents asserted a no evidence motion for summary judgment, as no evidence existed to support any of Petitioners' claims; and (4) Petitioners' failure to serve Initial Rule 26 Disclosures precluded them from introducing any evidence of witnesses at trial, pursuant to FED.R.CIV.P. 37(c)(1).

On July 3, 2007, Petitioners filed their Response to Respondents' Motion for Summary Judgment and stated that "because the Court already denied two motions brought by the Plaintiffs [Petitioners] seeking to withdraw the deemed admissions, it is impossible for the Plaintiffs to overcome Defendants' [Respondents'] motion for summary judgment based upon the defaulted admissions being deemed admitted."

On July 16, 2007, the district court granted Respondents' Motion for Summary Judgment on all claims, predicated upon the following two grounds: (1) that the deemed admissions negated the existence of a material element on each of Petitioners' claims; and (2) Petitioners' failed to point to any evidence that would support a finding in their favor at trial. However, the district court did not address Respondents' claims related to the limitations and Rule 37(c)(1) issues, and denied all other pending motions as moot. Final judgment was

entered on July 17, 2007. [3]

Petitioners timely filed a Notice of Appeal on July 23, 2007. However, on September 21, 2007, the Clerk of the Court of Appeals for the Fifth Circuit entered an order dismissing the appeal pursuant to Local Rule 42 predicated upon Petitioners' failure to order transcripts and make financial arrangements with the court reporter. Petitioners filed an unopposed motion seeking to reinstate the appeal on the grounds that transcripts were not necessary to decide the issues which would be raised on appeal. On September 29, the Clerk entered an order granting Petitioners' unopposed motion to reinstate the appeal.

Petitioners argued on appeal that: (1) the district court had abused its discretion when the district court entered an order directing the clerk to unfile both of Petitioners' motions seeking an extension of time to comply with the Respondents' Requests for Admissions and Other Discovery Materials based upon a technical violation of N.D. TEXAS LOCAL RULE 7.1(b)(1) and (2) the district court's abuse of its discretion ultimately resulted in Respondents' Requests for Admissions being deemed admitted under FED.R.CIV.P. 36(a)(3) wrongfully provided Respondents with grounds to obtain summary judgment in their favor.

On April 8, 2008, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decisions in a brief unpublished opinion condemning Petitioners' lawsuit. Said opinion shows the panel had threatened Petitioners with sanctions if they decided to pursue this matter any further in the Court of Appeals for the Fifth Circuit.

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3. ***Sharif v. Wellness Int'l Network, Ltd,*** No, 07-10834, 2008 U.S. Appx. LEXIS 7483, at *2, ___ Fed. Appx. ____ (5th Cir. April 28, 2008) (not for publication).

"After this appeal was dismissed for Appellants' failure to order a transcript timely and make financial arrangements with the court reporter, it was reinstated on September 26, 2007, leaving pending in the district court Appellees' motions for at least $425,000 attorney fees pursuant to Fed.R.Civ.P.54(d)(2). A review of the record on appeal demonstrates that Appellees' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with period of non-performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages and double costs pursuant to FRAP 38 at our disposal. AFFIRMED; REMANDED FOR RULING AND DETERMINATION OF APPELLEES' MOTION FOR ATTORNEY FEES."

(See copy of the opinion set forth in the Appendix at A.)

REASONS FOR GRANTING CERTIORARI

1.

The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings in this case, as to call for an exercise of this Court's supervisory power.

I. The District Court's Rule Making Authority

The authority of the United States District Courts to adopt or promulgate rules emanates from three sources. First, Congress has vested this Court with the authority to prescribe rules of practice and procedure for the federal courts. 28 U.S.C. § 2072(a). Pursuant to that authority, this Court has adopted Federal Rule of Criminal Procedure 57 ("Rule 57"), which provides that each district court may from time to time make or amend rules governing its practice, provided the rules are consistent with the Federal Rules of Criminal Procedure. *See also* Fed.R.Civ.P. 83 (civil analogue). Second, Congress has vested federal district and circuit courts with the independent authority to prescribe local rules of practice consistent with Acts of Congress and the rules of practice and promulgated by this Court. 28 U.S.C. § 2071(a). Finally, this Court has long recognized that district courts have certain inherent rule-making powers arising from the nature of the judicial process. ***See* Chambers v. NASCO, Inc.**, 501 U.S. 32, 43, 111 S.Ct. 2123, 2132, 115 L.Ed.2d 27 (1991); **Link v. Wabash Railroad Co.**, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); **United States v. Hudson**, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812) ("Certain implied powers must necessarily result to our Court of jurisdiction from the nature of their institution.").

Consistent with these principles, this Court has upheld

the authority of district courts to promulgate local rules unless 1) the rule conflicts with an Act of Congress; 2) the rule conflicts with the Federal Rules of Criminal Procedure; 3) the rule is constitutionally infirm; or 4) the subject matter governed by the law is not within the power of the district courts to regulate. ***See*** **Frazier v. Heebe,** 482 U.S. 641, 654, 107 S.Ct. 2607, 2616, 96 L.Ed. 2d 557 (1986); (Rhenquist, C.J., dissenting) (citing **Colgrove v. Battin,** 413 U.S. 149, 159-60, 162-64, 93 S.Ct. 2448, 2454, 2455-57 (1973); **Miner v. Atlas,** 363 U.S. 641, 651-52, 80 S.Ct. 1300, 1306-07, 4 L.Ed.2d 1462 (1960); **Story v. Livingston**, 38 U.S. (13 Pet.) 359, 368, 10 L.Ed. 200 (1839)). In addition, this Court has struck down a local rule which it deemed "unnecessary and irrational." *Id.* at 646 (majority opinion). It follows that Local Rules are presumptively valid unless they contravene one of the five principles mentioned above.

II. The Fifth Circuit Court of Appeals has condoned the district court's enforcement of N.D. TEXAS Local Rule 7.1(B)(1) in a manner which is prohibited by Federal Rule of Civil Procedure 83(a)(2).

Federal Rule of Civil Procedure 83(a)(2) states in pertinent part:

"A local rule imposing a requirement or form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement."

The advisory committee notes regarding Fed.R.Civ.P. 83(a)(2) states in pertinent part:

"Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For

example, a party should not be deprived of a right to a jury because its attorney, ***unaware of - - or forgetting*** - - a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn - - covering only violations attributable to nonwillfull failure to comply and only those involving local rules directed to matters of form."

Fed.R.Civ.P. 83, 1995 Notes of Advisory Committee (emphasis added).

Local Rule 7.1(b)(1) of the United States District Court for the Northern District of Texas states as follows:

" b. **Certificate of Conference.**

1. Each motion for which a conference is required must include a certificate of conference indicating that the motion is unopposed or opposed,

2. If a motion is opposed, the certificate must state that a conference was held, indicate the date of the conference and indicate the identities of the attorneys conferring, and explain why agreement could not be reached.

3. If a conference was not held, the certificate must explain why it was not possible to confer, in which event the motion will be presumed to be opposed."

Here, the record shows Petitioners' counsel had advised the district court in the body of a three-page motion that he had conferred with Respondents' counsel and that Respondents' counsel had advised Petitioners' counsel that he was opposed to the court granting Petitioners' motion for an extension of time to comply with Respondents' Requests for Admissions and other discovery materials, rather than, attaching a separate certificate of conference to the motion. Therefore, Petitioners' counsel's error was merely an error of form which falls under the savings

clause of Fed.R.Civ.P. 83(a)(2) to protect against the loss of rights.

The Fifth Circuit's opinion affirming the district court's judgment is devoid of any reference to the protection afforded a litigant under Fed.R.Civ.P 83(a)(2), which arises when a litigant commits a violation of N.D. TEXAS LOCAL RULE 7.1(b)(1) related to matters of form.

Moreover, the undersigned's research has been unable to unearth a single Fifth Circuit case which squarely addressed the issue of a district court ordering the clerk to unfile a motion because a litigant's attorney failed to attach a separate certificate of conference which served as grounds for the opposing party being able to obtain summary judgment in their favor. In fact, the only case wherein a federal appeals court has addressed N.D. TEXAS LOCAL RULE 7.1 appears to be **Construction Drilling, Inc., v. Chusid,** 131 Fed.Appx. 366 (3rd Cir. 2005).

This unpublished opinion shows that the Third Circuit held that the total failure of a litigant to comply with N.D. TEXAS LOCAL RULE 7.1 did not preclude a Texas district court from entering a judgment against a party in the amount of $2,400,000, even though, the Texas district court did not give the party 20 days to respond as required pursuant to N.D. TEXAS LOCAL RULE 7.1(e).

Thus, applying the Third Circuit's reasoning to the facts of this case, the Fifth Circuit's decision affirming the district court decision to unfile Petitioners' motions for a technical violation of N.D. TEXAS LOCAL RULE 7.1(B)(1) is in direct conflict with the Third Circuit Court of Appeals unpublished decision in **Chusid.**

2.

This case presents an issue of first impression because the question of whether a district court may enforce a local rule in a manner which causes a party to lose rights contrary to the savings clause provided under Federal Rule of Civil Procedure 83 (a)(2) has never been squarely addressed by this Court.

This Court does not merely sit to correct errors by other courts. It does, however, have supervisory authority over the other federal courts when they adopt and enforce local rules to ensure that these local rules are in fact consistent with " ' the principles of right and justice.' " **Frazier v. Heebe,** 482 U.S. 641, 96 L.Ed. 2d 557, 107 S.Ct. 2607, (1997) (citing **In re Ruffalo,** 390 U.S. 544, 554, 20 L.Ed.2d 117, 88 S.Ct. 1222, (1968) at pg. 565). In **Frazier,** this Court used its supervisory powers to declare a Federal District Court rule that Louisiana bar members reside or maintain an office in Louisiana in order to be admitted to the District Court bar to be invalid.

Federal Rule of Civil Procedure 83(a)(2) is fairly new. The undersigned's research has been unable to unearth a single case wherein this Court has addressed a district court's enforcement of a local rule in a manner which causes a party to lose rights in contravention of the savings clause provided under Fed.R.Civ.P. 83(a)(2).

This case was decided on summary judgment. The record, therefore, will not overburden this Court. However, as previously discussed, this case should not have been decided on summary judgment.

Moreover, deciding the following substantive question would simultaneously clarify an important procedural point within this Court's supervisory authority: May a district court enforce a local rule in a manner that causes a party to have summary judgment being entered against the party in contravention of Fed.R.CIV.P. 83(a)(2)?

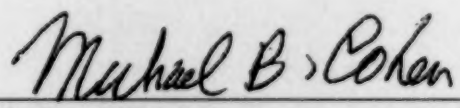
CONCLUSION

A United States District Court in contravention of the savings clause contained in Fed.R.CivP. 83(a)(2), based upon a technical violation of form of N.D. TEXAS LOCAL RULE 7.1(b)(1), has denied Petitioners their right under the Seventh Amendment to have their claims decided by a jury.

The Fifth Circuit Court of Appeals has failed to address this issue in their opinion affirming the district court's decision to unfile Petitioners' motions which subsequently provided the Respondents with grounds to obtain summary judgment in their favor.

For the foregoing reasons, Petitioners respectfully requests this Court to grant their Petition for Certiorari.

Respectfully submitted,



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Opinion of the United States Court of Appeals for the Seventh Circuit decided February 17, 2006 B-1 to B7

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-10834
Summary Calendar

RICHARD SHARIF, AS AGENT FOR SOAD WAITAR, HAIFA KAJ, AND RAGDA SHARIFEH; WAQAR KHAN; SHAFQUT KHAN; ABDUL RASHID; SHAHEEN RASHID

Plaintiffs-Appellants

v.

WELLNESS INTERNATIONAL NETWORK, LTD a/k/a WIN; RALPH OATS; CATHY OATS; WIN NETWORK INC.

Defendants-Appellees

Appeal from the united States District Court for the Northern District of Texas
(3:05-CV-1367)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges. Per Curiam:*

After this appeal was dismissed for Appellants' failure

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* Pursant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

order a transcript timely and make financial arrangements with the court reporter, it was reinstated on September 26, 2007, leaving pending in the district court Appellees' motion for at least $425,000 attorney's fees pursuant to Fed.R.Civ.P. 54(d). A review of the record on appeal demonstrates Appellants' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of non-performance or insubstantial performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming tall rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to full panoply of penalties sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.[1]

AFFIRMED; REMANDED FOR RULING AND DETERMINATION OF APPELLEES' MOTION FOR ATTORNEY'S FEES.

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[1] Appellants have filed a motion for reconsideration of the denial to file a reply brie out of time. The motion for reconsideration is DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

No. 05-2636
PRATIMA J. MUZUMDAR AND TRANQUIL PASSAGE

Plaintiffs-Appellants

v.

WELLNESS INTERNATIONAL NETWORK, LTD.
WIN NETWORK, INC., RALPH OATS, CATHY OATS
AND SHERRI MATTHEWS,

Defendants-Appellees

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 04 C 6175—**Charles R. Norgle, Sr.**, *Judge*

Nos. 05-2686 & 05-2827
Richard Sharif, Abdul Rashid, *et al.*,

Plaintiffs-Appellants,

v.

WELLNESS INTERNATIONAL NETWORK, LTD.
WIN NETWORK, INC., RALPH OAKES, CATHY OATES,
and SHERRI MATTHEWS.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 02 C 3047 & 02 C 5801—**Samuel Der-Yeghiayan**, *Judge*

Argued January 12, 2006—Decided February 17, 2006

Before FLAUM, *Judge*, and BAUER and EVANS, Circuit Judges.

EVANS, *Circuit Judge*. These cases are before us again: this time the issue involves forum selection clauses. Previously, in *Sharif v, Wellness International Network, Ltd.*, 376 F 3d 720 (7th Cir. 2004)[1], we reviewed and reversed a denial of a motion of compel arbitration with the result that claims less than $100,000 were subject to arbitration. That left some claims for consideration by the court. Before us now the question is "what court?"

The cases were filed in the United States District, Court for the Northern District of Illinois. The Muzumdar case comes to us from Judge Charles R. Norgle, Sr. and the Sharif and Rashid cases from Judge Samuel Der-Yeghiayan. The result in all three was the same: They were dismissed without prejudice pursuant to forum selection clauses found in the relevant contracts. Both judges found that the proper forum was Dallas County, Texas. The plaintiffs appeal.

A challenge to venue based upon a forum selection clause can appropriately be brought as a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(3). Our review of the enforceability of a forum selection clause is de *novo. Continental Ins. Co. v. M/V Orsula* 354 F.3d 603 (7th Cir. 2003)

1. The Sharif and Rashid actions were consolidated and were the subject of the first decision in this court. The Muzumdar plaintiffs withdrew from the first appeal.

The lawsuits involved distribution contracts that the plaintiffs had with Wellness International Network (WIN). The appellants contend that while WIN claims to be in the business of selling health and wellness products, it was actually engaged in an illegal pyramid scheme. The appellants assert a number of claims, including violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962), federal securities laws, and various Illinois statutes.

Each appellant signed either an associate agreement or a distributor agreement. The associate agreement says:

> JURIS DICTION AND VENUE OVER ANY DISPUTES ARISING OUT OF THIS AGREEMENT SHALL BE PROPER ONLY IN THE FEDERAL OR STATE COURT IN DALLAS COUNTY, TEXAS.

The distributor agreement says.

> ANY DISPUTE OR CLAM ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT OR WITH RESPECT TO THE BUSINESS RELATIONSHIP ESTABLISHED BY THE AGREEMENT . . . SHALL BE PROPERT ON/BEFORE AN ARBITRATION PANEL CONVENED, OR IN A STATE OR FEDERAL COURT PRESIDING IN DALLAS COUNTY, TEXAS . . .

The clauses certainly seem clear enough, especially because under either federal or Illinois law, forum selection clauses are valid and enforceable. *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc., 2006 Wl 230179,__F.3d__ 7th Cir. Feb. 1 2006).*[2] There is no ambiguity about where the parties agreed to litigate this

dispute. What then do the appellants argue?

They contend that in the WIN rules and regulations negates the mandatory forum selection clause. The WIN rules state.

> Each distributor hereby irrevocably and unconditionally submits themselves and their property to the non-exclusive jurisdiction of any arbitration panel convened, or a court of competent jurisdiction in Dallas County, Texas, and further irrevocably and unconditionally waives, to the fullest extent that a distributor may legally and effectively do so, any objection that such distributor may have now or hereafter to such venue, including the defense of any inconvenient forum.

This provision, written in the usual mumbo-jumbo of lawyer speak, supersedes the contract language, appellant argue, because the contract says so. The associate contract and the distributor contract state:

> I HAVE READ THE WIN RULES & REGULATIONS AND I AGREE THAT THEY ARE INCORPORATED BY REFERENCE INTO THIS AGREEMENT IN PRESENT FORM AND THAT THEY ALSO MAY BE AMENDED BY WIN FROM TIME TO TIME.

The distributor agreement further states:

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2. IFC held open the question as to whether state or federal law applies in a dispute over a forum selection clause when the case is dismissed rather than transferred pursuant to 28 U.S.C. § 1404(a). We see no need to examine that question in this case.

IN THE EXTENT THAT THERE ARE ANY CONFLICTS BETWEEN THIS AGREEMENT AND THE WIN RULES & REGULATIONS SHALL GOVERN.

The argument is that the WIN rules language — "non-exclusive jurisdiction" — which renders the forum selection clauses permissive; because the WIN Rules govern, the argument continues, the forum selection clauses are merely permissive. Appellants leap from the phrase "non-exclusive jurisdiction" to the issue of forum or venue, because the provision in the Win rules is entitled "Venue." However, that word cannot carry so much weight. The WIN rules also provide that titles and subtitles are inserted for convenience and do not affect the meaning of the rules, and the provision itself refers only to jurisdiction.

Therefore, what Win rules provide is a nonexclusive jurisdiction provisions, requiring the appellants to submit to the personal jurisdiction of the Texas courts. We cannot find that a provision which requires appellants to submit to the "non-exclusive" jurisdiction of Texas courts somehow undermines a very strongly worded forum selection clause containing mandatory language: "SHALL BE PROPER ONLY" or "SHALL BE PROPER" in Dallas County, Texas. We have found such mandatory language to require enforcing a forum selection clause. We have said that where venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive. *See*

Paper Express, Ltd. V. Pfankuch Maschinen GmbH, 972 F.2d 753 (7th Cir. 1992)

Appellants also spend a good deal of time trying to convince us that because the contracts themselves are void and unenforceable as against public policy — i.e., they set out a pyramid scheme — the forum selection clauses are also void. The logical conclusion of the argument would be that the federal courts in Illinois would first have to determine whether the contracts were void before they could decide whether, based on the forum selection clauses, they should be considering the cases at all. An absurdity would arise if the courts in Illinois determined the contracts were not and that therefore based on valid from selection clauses the cases should be sent to Texas — for what? A determination as to whether the contracts are void?

What is true is that a forum selection clause can be found invalid because the clause itself was procured by fraud. As the court established in *The Breman v. Zapata Off Shore Co.*: 407 US 1, 15 (1972), a forum selection clause will be enforced unless it can be clearly shown "that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Appellants make no attempt to show that the forum selection clause was itself obtained by fraud.

The appellants contend, however, that this contract was a contract of adhesion. We reject that contention. The appellants were parties to what a somewhat sophisticated business deal. It is hard to conclude that they would have signed a contract worth more than $100,000 without

considering its provisions. Contrast this situation with one involving a truly nonnegotiated contract. In Carnival *Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991), the Supreme court held that even a forum selection clause in a commercial passage contract — that is, a ticket for a cruise — was enforceable. The forum selection clauses in these cases are enforceable.

Accordingly, the judgments of the district court dismissing these cases are AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for Seventh Circuit